DOCUMENT RESUME

ED 280 083 CS 210 401

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TITLE Critical Thinking and Legal Discourse.
PUB DATE Mar 87
NOTE 11p.; Paper presented at the Annual Meeting of the Conference on College Composition and Communication (38th, Atlanta, GA, March 19-21, 1987).
PUB TYPE Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Cognitive Processes; *Content Area Writing; *Critical Thinking; Expository Writing; *Law Schools; Law Students; Lawyers; *Legal Education (Professions); Student Writing Models; Writing Instruction; *Writing Skills
IDENTIFIERS Legal Information; Legal Language; *Legal Writing

ABSTRACT

Although law professors often say that first year law students need training to "think like lawyers," many law students survive law school by practicing the "skill" of rote memory. It is when they take the bar examination or actually begin to work in a law office that they need the faculty of analytical thinking, for notes must be organized into a cogent argument. Most attorneys need special facility with four cognitive processes: applying law to facts, analogizing cases, drawing inferences, and focusing abstract concepts. The ideal place to teach these critical thinking skills is in legal writing classes, where written discourse offers the best opportunity for correcting deficiencies and refining skills in using critical cognitive processes. Strategies for teaching critical thinking in legal writing seminars include the following: (1) attach the writing class to a substantive law course, (2) focus primarily on organization at a variety of levels, (3) encourage the students to make their organization visible, (4) pay more attention to the effect of the prose on the reader than to the writing process, and (5) insist on multiple revisions. Legal writing combines some elements of freshman composition, literary criticism, and technical writing but depends strongly on reasoning abilities that law students have had little opportunity to develop. (NKA)

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CRITICAL THINKING AND LEGAL DISCOURSE

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--Kristin R. Woolever
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Most law schools take for granted that their students can think critically. According to many law faculty, first year students may need training in how to "think like lawyers," but what does that really mean in the context of the law school curriculum? After a semester immersed in substantive law courses, first year students quickly learn that they will sink or swim depending on their ability to memorize, not their ability to think critically. Unfortunately, many law students can survive three years of law school--and even make law review--by practicing the "skill" of rote memory. By memorizing the statutes, the case law, and the professor's lectures and spitting them back during exams, law students can graduate successfully.

When these same students take the bar exam or when they go to work as a clerk or as an associate in a law office, they're often at a loss. In any state, the bar examination requires analytical thinking. For example, the preface to the 1975 California Bar Exam reads this way:

"An answer should demonstrate your ability to analyze the facts presented by the question, to select the material from the immaterial facts, and to discern the points upon which the case turns. It should show your knowledge and understanding of the pertinent principles and theories of law, their relationship to each other, and their qualifications and limitations. It should evidence your ability to apply the law to the facts given, and to reason logically in a lawyer-like manner to a sound conclusion

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from the premises adopted. Try to demonstrate your proficiency in using and applying legal principles rather than a mere memory of them.

An answer containing only a statement of your conclusions will receive little credit. State fully the reasons that support them. All points should be thoroughly discussed. Although your answer should be complete, you should not volunteer information or discuss legal doctrines that are not necessary or pertinent to the solution of the problem."

The primary skills needed to perform well on the exam are cognitive ones not emphasized in most substantive law courses: the ability to see relationships and understand the interweavings of the law's fiber. Instead, these classes emphasize legal research skills--certainly a necessary part of"good lawyering," but a skill that often allows students to be efficient "collectors" rather than careful thinkers. Once the students have thoroughly researched the applicable statutes and case law, then they face the task hardest for them: organizing the scattered notes into a cogent argument or analysis. Organization is the most difficult thing both for law students and for practicing attorneys. As people trained in the structure of the law, they immediately look for standard writing structures--formulae--to get them through this task.

One of the reasons legal discourse is often impenetrable is that it is formulaic in its phrasing and its organization. The standard formulae for legal analysis is the acronym IRAC (Issue, Rule, Application, and Conclusion), as any law student knows and uses in all writing situations. Such a formula encourages the

writers to do sufficient research to fill in the blanks, but it denies critical thinking, resulting in densely organized and repetitive prose laden with traditional trappings.

Ironically for such formula-dependent students, the actual practice of law demands critical reasoning abilities moreso than many professions, as even the bar exam instructions mentioned earlier indicate. In practice, most attorneys need special facility with four cognitive processes:

- applying law to facts
- analogizing cases
- drawing inferences
- focusing abstract concepts

The ideal place to teach these critical thinking skills is in legal writing classes--a recent addition to most law school curriculum. In the past, many law students proved their analytical prowess by oral argument in class. While that technique works to some extent and is valuable for future trial lawyers, written discourse provides the best opportunity for students to practice the four cognitive skills in their purest form--without the dramatic flair common to oral advocacy. Increasingly, law schools are adding first year and advanced writing seminars to their course offerings, and the classes fill immediately as students recognize the value of such instruction.

To illustrate why critical thinking skills are so important to include in the law school curriculum, compare the following two issue statements from two memoranda of law. In a legal memo, the issue statement presents the problem the rest of the memo analyzes. As such, it appears first in the document and should focus the legal problem clearly. Think about which of these is better and why:

ISSUE: Whether intentional torts by an employer, such as the Clinic's wrongful discharge of Vivian Casterbank and the intentional infliction of emotional distress, are exceptions in whole or in part to the general rule that Casterbank's exclusive remedy is within the Michigan Worker's Compensation Act.

ISSUE: Does the exclusive remedy provision of the Michigan Worker's Compensation Act bar recovery in a civil suit for any or all of Vivian Casterbank's alleged injuries: lost wages and benefits resulting from the breach of her employment contract; humiliation, embarrassment, mental anguish, and damage to her reputation resulting from her wrongful discharge; and a disabling psychological condition caused by her wrongful discharge?

Note that the primary cognitive skill the writer needs to master here is the fourth on the list presented earlier: focusing abstract concepts. But many of the other critical reasoning skills come into play here as well. A good issue statement must not only focus the parts of the problem, it should also cue the reader about how the rest of the discussion will proceed. In

other words, good issue statement should do three things: (1) include the applicable rule, (2) apply the law to the facts of the case, and (3) indicate the organization of the discussion to follow. As you can see, the second issue does these things much more clearly than the first one. It begins with the specific applicable rule--Michigan Worker's Compensation Act--and it thereby creates a legal context in which to present the facts of the Casterbank case. Further, the writer probably intends to organize the memorandum around the nature of the injury: Can Casterbank win compensation on the basis of breach of contract, non-disabling injuries and disabling injuries resulting from wrongful discharge? Everything is in focus and the reader's expectations are set.

The other issue begins with the facts (intentional torts) and ends with the rule, thereby forcing the reader to go to the end before understanding the meaning. And there is no clue to the organization of the discussion to follow. As a result, the reader will have a difficult time following the analysis. and the writer probably hasn't thought clearly about how the parts of the discussion interrelate. In this instance, the writing assignment provides the opportunity to teach these abstract cognitive skills in a manner the law students can understand immediately and put to good use. And the assignment has little to do with formulae such as IRAC. The writers must come to terms with the legal relationships before they can organize for the reader and have the issue statement make sense.

But while the above example illustrates the importance of three of the cognitive skills necessary for legal writers, it omits one: analogizing cases. And that particular skill is especially difficult for writers because it requires knowing the rule, the facts of the analogous case, the facts of the present case, the relevant point of comparison, and communicating all of these cogently to the reader. Juggling so many ideas at once can cause confusion for even the most organized writer, not to mention the further step of clarifying the relationships for the reader. For an effective case analogy, the writer needs to present the legal point of comparison, the basic relevant facts, the holding, and the application to the instant case. Otherwise, it's easy for writers to produce something as fuzzy as this:

> "An employee may bring civil action against an employer for sexual discrimination. However, Worker's Compensation provides exclusive remedy for injuries not incidental to the cause of action and where they culminate in disability. If the injuries are incidental to the discrimination, they are not barred. Stimson v. Michigan Bell Telephone Co. 77 Mich. App. 361, 258, N.W.2d 227 (1977). The court distinguishes between the tort of sexual discrimination and injuries stemming from the tort while it employs a merger system between physical and mental injuries and those which are disabling and non-disabling."

What's the focus of that paragraph? What are the facts in Stimson that caused the court to rule the way it did? And what is the specific application to Vivian Casterbank? As you can see, the writer focused solely on the general concept of the law and failed to anchor it in any specific context at all.

These are just a few examples of how critical reasoning deficiencies appear in legal writing and can be dealt with in the classroom. As you may imagine, the craft of legal writing includes many more pitfalls such as these, and we could spend the entire discussion cataloguing weak examples. Instead, it seems more productive to list solutions for these problems, or at least to suggest some techniques for teaching legal reasoning skills in writing classes. The following suggestions outline a strategy for teaching critical thinking in legal writing seminars:

1. Attach the writing class to a substantive law course.

   Too often legal writing classes invent assignments the students fail to take seriously because they don't see the relevance of the material to their other courses. Combining a writing class with the course content of a contracts or torts class or more advanced classes will focus the students' attention and benefit both their writing abilites and their understanding of the substantive law.

2. Focus primarily on organization on a variety of levels.

   If critical reasoning depends on the students' understanding of relationships, focusing on organization will force the writers to arrange the material so that

it makes sense. And in dealing with organization, the effective instructor can discuss writing and thinking at the large-scale level, small-scale (paragraph or multi-paragraph "chunks") level, down to the sentence level organization.

3. Encourage the students to make their organization visible.

Recent research in document design suggests that establishing visible hierarchies in the organization of the prose aids writers and readers in better understanding relationships among the parts. Common sense says that making relationships visible (via using headings and sub-headings, lists, charts, and so forth) will provide a clearer picture of the ideas. But the more subtle ways of making the order "visible" have nothing to do with pictures, but instead require the writer to verbally indicate the pattern of the argument and to order the material deductively so the context for the discussion is set before the details are given.

4. Pay more attention to the prose's effect on the reader than on the writing process.

As heretical as this may sound, the emphasis in a class focusing on critical thinking should be on communicating the ideas to an audience, rather than on the writer's grappling with the material. In explaining clearly to the audience, the writer must thoroughly understand the concepts.

5. Insist on multiple revisions.

In editing the prose more than once, students can see the first arrangement is not necessarily the only organization or the best one. Further, students can also quickly see that organization effects meaning--especially in advocacy writing.

Legal writing seminars provide a unique opportunity to teach critical reasoning skills. Unlike the emphasis in freshman composition classes, the focus here is not on writing as a means of discovery. And unlike writing literary criticism, the organization of legal analysis must be more deductive and contain visual cues for the reader. On the other hand, legal discourse does not go to the extreme of technical documents which depend solely on visual cues to guide the reader through step-by-step processes. Legal writing combines elements from each of these and allows the writers to test their critical thinking skills in

an area of study that depends on those reasoning abilities but rarely has provided opportunities to develop them.